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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF MONTANA
 MISSOULA DIVISION

20 Russell Smith United States Courthouse
21 201 East Broadway
22 Missoula, Montana 59802
Thursday, October 12, 2023
08:58:53 to 10:11:19

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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1 PROCEEDINGS

2 (Open court.)

3 THE COURT: Good morning. Please be seated.

4 Well, good morning, everybody. And, those of you
5 from out of state, welcome to beautiful Missoula.

6 So before we get started in this case, in September
7 of this year, the Judicial Conference of the United States
8 altered the standards of whether or not streaming can be
9 allowed in the Federal District Court. And the conference
10 indicated that the presiding judge presiding over any civil
11 nontrial proceeding can authorize live remote public audio
12 access to any portion of the proceedings in which a witness is
13 not testifying, and that's the Judicial Policy Section 420(b).
14 And as I indicated, that went into effect in September of this
15 past year.

16 There have been a number of requests by outside
17 entities for streaming, audio streaming, of the arguments in
18 this case, and I have indicated to the clerk's office that, as
19 the presiding judge, I have no objection so long as there is
20 an understanding that if a witness is called, then the IT
21 people have been instructed to follow my direction, which is
22 to terminate any audio streaming as long as there is a witness
23 that is engaged in active testimony in the case.

24 And I have no idea what the parties' intentions are,
25 but in the event that there is a witness, then the audio

1 stream will be terminated, and then, at the conclusion of
2 whatever witness, if there is a witness, once it's back to the
3 oral argument of the attorneys, then that would be -- the
4 streaming would be allowed again.

5 I think, for the benefit of those who happen to be
6 listening to the streaming, if you would, and also for the
7 benefit of the court reporter, indicate your name when you are
8 making whatever argument you are, and I'll try and address you
9 myself by your first name so that there is a record.

10 So is there any question about that from counsel
11 about what the policy is and the live streaming?

12 (No response.)

13 THE COURT: I don't see anybody volunteering to ask
14 the Court questions, so would you please call the first matter
15 on the calendar?

16 THE CLERK: This is the time set for a hearing on
17 motions for preliminary injunction in Consolidated Cases
18 CV 23-56-M-DWM and CV 23-61-M-DWM, *Alario et al. v. Knudsen*.

19 THE COURT: Well, each party has 30 minutes, and I
20 believe, Ms. Kumar, you are up first. And if you intend to
21 reserve any of your time, you need to tell me. I'll give you
22 a heads-up, but if you keep talking, you're using your time.

23 So do you want to save any time for rebuttal?

24 MS. KUMAR: Yes, Your Honor. Mr. Berengaut and I
25 have agreed, first, in the first instance, to split the time

1 that we have together, so 15 minutes for each of us. Each of
2 us will reserve three minutes of our time for reply.

3 THE COURT: All right. So you're gonna argue for
4 12 minutes.

5 MS. KUMAR: Yes, Your Honor.

6 THE COURT: All right. You're up.

7 MS. KUMAR: Good morning, Your Honor.

8 Ambika Kumar for the creator plaintiffs.

9 I will handle the First Amendment arguments,
10 although Mr. Berengaut may weigh in on the First Amendment on
11 behalf of the company. Mr. Berengaut will handle the
12 preemption arguments.

13 The parties intend to rest on the papers for the
14 Commerce Clause unless the Court has questions.

15 Turning to the First Amendment issue, Montana's ban
16 of TikTok shutters a forum for communication on which
17 plaintiffs undisputedly rely to express themselves and, in
18 some cases, to make a living. It is overbroad and fails
19 strict or even intermediate scrutiny under the First
20 Amendment.

21 As a threshold matter, Your Honor raised the
22 question of the Montana Constitution in an order. We believe
23 SB 419 violates the Montana Constitution, but unfortunately a
24 Federal Court cannot offer them relief if -- the plaintiffs
25 relief unless the State waives its sovereign immunity, so

1 we're focused here on the First Amendment argument.

2 I'll talk about the two doctrines under which we've
3 made our claims, overbreadth and scrutiny, starting with
4 overbreadth.

5 The law prohibits TikTok from operating altogether.
6 Banning a forum for communication is a regulation of speech
7 subject to the First Amendment. And under the First
8 Amendment, a law is overbroad if a substantial number of its
9 applications are unconstitutional, judged in relation to the
10 statute's plainly legitimate sweep. So the Court has to look
11 at what, if any, is a legitimate sweep of the law, and are
12 there a substantial number of applications that are
13 unconstitutional?

14 Starting with the sweep, the law has little, if any,
15 legitimate sweep. The State has posited two interests in the
16 law. The first is to protect national security, and the
17 second is to prohibit, quote-unquote, dangerous content.

18 Starting with the interest in foreign affairs, in
19 national security, the State has no interest in national
20 security. And even if it did, they have cited no evidence of
21 their interest here. They cite a handful of newspaper
22 articles largely summarizing allegations made by former
23 employees.

24 In contrast, TikTok has provided declarations
25 attesting that the State's speculation that TikTok is stealing

1 user data against their will and sharing it with China is
2 false.

3 With respect to the interest of, quote-unquote,
4 dangerous content, the State may regulate only unprotected
5 content. The Supreme Court has held time and again that the
6 State may not prohibit constitutionally protected speech
7 merely because the State believes that speech will harm
8 people. The Supreme Court has also identified a discrete set
9 of categories of unprotected speech and cautioned that the
10 states cannot expand them on their own.

11 THE COURT: Well, tell me something. Are you taking
12 the position that the State of Montana, under the
13 Constitution, cannot regulate any aspect of the internet?

14 MS. KUMAR: That, that's the Commerce Clause
15 argument, and I don't think the --

16 THE COURT: Well, tell me. I mean, if the State
17 says, hypothetically, TikTok is asking for information that
18 the users consent to and they give that voluntarily to TikTok,
19 is it your position that TikTok cannot be regulated in any
20 way? Because I think if you look at this morning's news,
21 didn't the State of New York and the attorney general there
22 yesterday introduce some regulation of the internet concerning
23 safety for children and that sort of thing?

24 MS. KUMAR: So to answer your question, our position
25 is not that the State can never regulate anything on the

1 internet. Our position is that the State has gone completely
2 overboard. It's not even close as to whether they've
3 regulated too much, and that's underscored by the alternatives
4 that they had that they appear not to have even considered,
5 much less excluded.

6 So there are at least three alternatives that we can
7 think of. One is Montana has a consumer privacy statute that
8 was enacted largely at the same time that the ban was enacted.
9 The State could enforce that statute.

10 Second, the State could offer heightened protections
11 for journalists, government officials, and anyone that is,
12 quote, adverse to the Chinese Communist Party's interest,
13 which appears to be their interest on the face of the statute.
14 And, indeed, the State has already banned TikTok on government
15 devices which is a step in that direction.

16 Third, the State could enact a law prohibiting the
17 transfer of data to specified third parties. Instead of doing
18 that, the State banned the entire forum, and that is plainly
19 overbroad. It is unconstitutional under the *Jews for Jesus*
20 case in which the municipality of Los Angeles enacted a ban of
21 First Amendment activities in the central area terminal of
22 Los Angeles International Airport. And the Court said -- the
23 Supreme Court said that is completely overbroad because it
24 bars speech that even has no risk of being disruptive, which
25 was the State's asserted interest. And the Court held that

1 there was no conceivable government interest that could
2 justify such a prohibition. And the same is true here. There
3 is no interest that could justify TikTok's complete ban in the
4 State of Montana.

5 THE COURT: So when they enact legislation, I think
6 your earlier argument, if I can take you back to that, is that
7 there were two principal reasons: national security, because
8 of arguments about the People's Republic of China and/or the
9 Chinese military, and then the dangerous content.

10 Is there some prohibition for a legislature enacting
11 legislation that may not have any factual basis but it's just
12 an opinion of the law enforcement people or some other
13 entity -- I mean, they actually have to have facts to make
14 legislation -- or are they free to do whatever they want so
15 long as it's made within the confines of the Constitution?

16 MS. KUMAR: They have to have facts. And I would
17 point the Court towards *Brown v. Entertainment Merchants*
18 *Association* in which the State of California tried to regulate
19 violent video games. And the State actually provided studies
20 purporting to show the harm caused by violent video games, but
21 the Court rejected that and said that's just conjecture. It's
22 just speculation, correlation, not causation.

23 We don't even have a study or an expert declaration
24 or anything from the State that even, after the fact, tries to
25 articulate the facts that would be necessary to serve -- to

1 show compelling interest. Indeed, the State asked for
2 discovery in this matter on an expedited basis, which was
3 provided to them. They haven't cited any of that evidence.
4 They haven't said that the production was incomplete or said
5 that they need more. They've rested on this handful of
6 newspaper articles for their national security interest.

7 With respect to the dangerous content, they don't
8 even, they don't -- they appear to have abandoned that
9 interest in their opposition to the preliminary injunction
10 motion, perhaps because, in looking at the case law, it is so
11 clear that the State cannot regulate protected speech in this
12 manner.

13 So, yes, the State has to have some evidence of its
14 interest, and it has provided none here, nor has it rebutted
15 the evidence that has been provided by TikTok.

16 Turning to the level of scrutiny, assuming the Court
17 does not rule on overbreadth grounds, it should strike down
18 the ban under the applicable level of scrutiny.

19 Plaintiffs contend that strict scrutiny applies for
20 several reasons. First, because the law effectuates a prior
21 restraint by stopping speech from happening in the first
22 place. Second, because it singles out a single entity,
23 TikTok, for disfavor. And, third, because on its face, it
24 regulates on the basis of content by specifying the kinds of
25 content that it is concerned about in the preamble to the

1 statute. But it doesn't matter whether you apply strict or
2 intermediate scrutiny. Both tests result in the same
3 conclusion.

4 To start with, there is, again, no legitimate
5 government interest here for the reasons -- same reasons I
6 described earlier. Second, there is no relationship between
7 the means used and the goals served. Even under intermediate
8 scrutiny, the means chosen to solve a government interest must
9 not burden substantially more speech than is necessary to
10 further the government's legitimate interest.

11 Again, the State has alternatives. We have
12 identified alternatives that -- the State doesn't even try to
13 explain why it hasn't looked at them or used them.

14 And the infirmity in the law is underscored by its
15 underinclusion. TikTok's expert has testified that there are
16 many ways for foreign governments to obtain U.S. user data
17 and, not only that, that the user data that they could obtain
18 from TikTok is not particularly meaningful.

19 And the State admits, on the dangerous content
20 interest, that minors can -- they say, "We're only regulating
21 one platform." Well, that just underscores that minors can go
22 to any other platform anywhere else on the internet and
23 encounter the same content. So this underinclusiveness
24 reinforces the absence of tailoring.

25 THE COURT: Well, why can't the people who use

1 TikTok for commercial purposes do the same thing, just go to a
2 different platform and use that?

3 MS. KUMAR: So the creators have good reason for
4 preferring TikTok, attesting that they cannot reach the
5 audiences or consume the content they want on other platforms.
6 TikTok is unique. Unlike other platforms, it doesn't have
7 profile pages or doesn't focus on friends and family. Doesn't
8 have a place for posting photos or written, written material.
9 It is a video-sharing app, and TikTok's rep and the creators
10 have all attested that the app's organic reach, the reach to
11 an audience that doesn't require payment, is unparalleled.

12 The creators have specifically said that they cannot
13 simply pick up and move to a different platform. Ms. DiRocco
14 attested that she makes 10 to 30 percent of her income on
15 TikTok and has found no success -- not found success on other
16 platforms. She also has a community to which she would lose
17 access. She is a veteran. She uses TikTok to network with
18 other veterans about suicide prevention and the like. She has
19 tried to find similar communities and an audience on other
20 platforms and has failed.

21 The other declarants have made similar statements,
22 making clear that it's not simply a matter of getting off this
23 platform and getting on another platform.

24 THE COURT: You're at 11 minutes and 42 seconds, so
25 if you're gonna reserve three minutes, you're getting close.

1 MS. KUMAR: Okay. Well, then I will reserve the
2 rest of my time.

3 THE COURT: All right.

4 Mr. -- "Berengaut"? Is that correct?

5 MR. BERENGAUT: That's correct, Your Honor.

6 THE COURT: Did I pronounce your name correctly?

7 MR. BERENGAUT: You did, Your Honor. Thank you.

8 Thank you, Your Honor.

9 Without repeating Ms. Kumar's First Amendment
10 argument, I want to briefly touch on the question you posed
11 about whether the users of TikTok could go to another platform
12 in the event that SB 419 enters into effect. And the reason I
13 want to return to that point is because it raises the fact
14 that the company here has articulated two distinct First
15 Amendment interests that are implicated by the ban.

16 The first is the company's own speech on the TikTok
17 platform, and the second is the independent and equally
18 protectable right to exercise editorial judgment with respect
19 to the content that is allowed and not allowed on the
20 platform, and that's a right recognized in the *Hurley* line of
21 cases.

22 The reason I return to that point, Your Honor, is
23 because even at the intermediate level of scrutiny where the
24 question is whether there are ample alternative channels of
25 communication, if the right at issue is the right to exercise

1 editorial judgment with respect to the composition of this
2 platform, that is per se a right that can't be exercised on
3 any other platform because it's TikTok's right to do that on
4 its own platform.

5 And even if we looked at TikTok's right to engage in
6 speech on its own platform, in the *City of Ladue* case, the
7 Court recognized that displaying a sign from one's own
8 residence carries a message that's quite distinct from placing
9 that sign somewhere else. So, in other words, there is no
10 alternative for TikTok to engage in speech on its own platform
11 because its ability to do so, on its own platform, carries a
12 specific and additional significance.

13 Turning to preemption, Your Honor, the ban is
14 preempted both as a matter of the foreign affairs field
15 preemption doctrine and as a matter of conflict preemption.

16 Turning first to the foreign affairs preemption
17 argument, the parties agree that the *Movsesian* case sets out
18 the governing standard here, which has two elements. The
19 first element is whether the state law concerns an area of
20 traditional state responsibility. The State casts this as a
21 traditional exercise of the consumer protection power, but you
22 do not need to look further than the first line of the
23 statute's preamble to see that the real purpose of the statute
24 is to make a foreign affairs statement.

25 The first line of the statute says, "Whereas, the

1 People's Republic of China is an adversary of the United
2 States and Montana and has an interest in gathering
3 information about Montanans, Montana companies, and the
4 intellectual property of users to engage in corporate and
5 international espionage." It is clear from this language that
6 the real purpose of the statute is to declare a foreign policy
7 for the State of Montana.

8 The second element of the *Movsesian* standard asks
9 whether the state law intrudes on the foreign affairs powers.
10 Here, just as in *Movsesian*, the statute expresses a distinct
11 political point of view on a specific matter of foreign
12 policy. Put differently, it establishes a foreign policy for
13 Montana.

14 And, again, this is clear from this very first line
15 of the preamble where the statement is made that the People's
16 Republic of China is an adversary of the United States and
17 Montana, stated separately, again, with an interest in
18 international espionage against Montana.

19 And, Your Honor, it's particularly significant that
20 the language of this law articulates the United States and
21 Montana distinctly, both as adversaries of the People's
22 Republic of China. And the reason that is significant is
23 because in the Ninth Circuit *Von Saher* case, the Court said,
24 considering there a California statute, California cannot have
25 a distinct juristic personality from that of the United States

1 when it comes to matters of foreign policy -- or foreign
2 affairs, excuse me.

3 And that's exactly what we have here, the United
4 States and Montana cast as distinct juristic personalities
5 with respect to a question of foreign affairs.

6 THE COURT: Well, what about the sequence of events
7 here? I'm sure you followed it:

8 You have all the news articles that are referenced
9 by the State that are at the end, basically, of 2022;

10 Then on January 19 of 2023, Senate Bill 419 is
11 introduced;

12 On February 1, there is a Chinese balloon that's
13 flying over Montana, apparently collecting data or whatever;

14 And then the bill is signed into law I think on
15 May 14, or around there, of 2023.

16 So, I mean, is there some argument the State can
17 make that we have proof that the Chinese are collecting
18 information in Montana because there's a balloon flying over
19 that obviously was collecting some data for some reason?

20 MR. BERENGAUT: Your Honor, the State certainly
21 hasn't made an argument based on the balloon, but from our
22 perspective, that timeline simply reinforces -- and there were
23 statements made, to the effect that the balloon was a partial
24 justification for the law, which are cited in the papers.

25 But that sequence of events simply serves to

1 reinforce that this is really about making a foreign affairs
2 statement. If there was concern on the part of the
3 legislature about the Chinese balloon, an act of purported
4 international espionage, state-to-state espionage, and the
5 Montana Legislature took it upon itself to address that
6 concern through the ban of TikTok, that just brings us right
7 into the middle of the concerns that the Ninth Circuit was
8 talking about in *Movsesian*.

9 One more point briefly on field preemption, which is
10 that the concern about intrusion into the foreign affairs
11 power is not limited simply to the preamble of the law but
12 also reflected in its operative text. And in particular,
13 that's seen in Section 4 of the law, the contingent voidness
14 provision, which states that the ban "is void if tiktok is
15 acquired by or sold to a company that is not incorporated in
16 any other country designated as a foreign adversary [citation
17 omitted] at the time tiktok is sold or acquired."

18 Now this also brings us into some of the conflict
19 preemption questions, but it further serves to reinforce that
20 this law is really about managing what is perceived as a
21 foreign affairs challenge.

22 Turning to conflict preemption, the ban conflicts
23 with two different federal statutory schemes, the first being
24 IEEPA and the second being the CFIUS statute.

25 Addressing IEEPA first, when Congress enacted that

1 statute, it struck a considered balance. It authorized the
2 President to regulate foreign transactions in connection with
3 national security but specifically withheld the power to
4 regulate personal communications and informational materials
5 because of concerns about restricting speech.

6 In the 2020 TikTok litigation, the courts upheld
7 that balance by finding that it would violate IEEPA to ban
8 TikTok on a nationwide basis.

9 With SB 419, the State has overridden that balance
10 by banning TikTok irrespective of the presence of personal
11 communications and informational materials on the platform.
12 And the Supreme Court decision in *Arizona v. United States* is
13 really on all fours with this particular conflict preemption
14 concern.

15 In that case, the federal immigration law
16 specifically withheld the imposition of criminal liability in
17 certain immigration circumstances, and Arizona law layered
18 that liability on top of the federal scheme.

19 Both statutes, the state and federal, were
20 purportedly in service of the same goal, of addressing
21 immigration, but the Court found that the Arizona law upset
22 the balance that Congress struck and was accordingly
23 preempted, and the same is true here with respect to IEEPA.

24 And then very briefly on CFIUS, Your Honor, the
25 conflict here is a little different but no less clear. The

1 CFIUS statute empowers the President to mandate divestitures
2 of foreign acquisitions that, in his judgment, threaten
3 national security.

4 But the statute also puts other tools in the
5 President's tool kit. One of those tools is the ability to
6 negotiate a mitigation agreement with the companies involved
7 in order to address the government's concerns, and those
8 mitigation negotiations are ongoing right now between TikTok
9 and CFIUS.

10 SB 419 would take that tool out of the federal
11 government's tool kit by imposing a ban and, through the
12 Section 4 provision, mandating divestiture irrespective of the
13 outcome of those federal negotiations.

14 This literally preempts CFIUS's review by
15 eliminating a scenario of a mitigation agreement that would
16 permit the company to operate under the terms of that
17 agreement in all 50 states. I mean, why would any company
18 enter into negotiations with CFIUS at the federal level if any
19 state could override the outcome of that negotiation by
20 imposing its own national security judgment about divestiture
21 at the state level?

22 Thank you, Your Honor. I'll reserve the balance of
23 my time.

24 THE COURT: Well, let me ask you an off-the-wall
25 question.

1 MR. BERENGAUT: Yes, Your Honor.

2 THE COURT: So as you understand this law, does it
3 apply throughout the State of Montana, every geographic area,
4 or, I think the language is, "territorial jurisdiction of
5 Montana"?

6 MR. BERENGAUT: Yes, Your Honor.

7 THE COURT: Okay. So does the law apply -- there
8 are seven Indian reservations, and the State of Montana has
9 criminal jurisdiction over only one, Public Law 280, the
10 Salish and Kootenai. The territorial jurisdiction is defined
11 as "all places subject to the criminal jurisdiction of
12 Montana," which the State does not have criminal jurisdiction
13 at six of the seven indigenous reservations.

14 So nobody cited Article I, Section 8, Clause 3, in
15 its entirety, but I'll tell you what it says. Everybody cited
16 "[t]o regulate commerce with foreign nations, and among the
17 several states," and nobody cited the final clause, "and with
18 the Indian tribes."

19 So is there a conflict with the power of the federal
20 government in the instance where they have sole power,
21 criminal jurisdiction, over six of the reservations? Does
22 this law apply to the reservations?

23 MR. BERENGAUT: Your Honor, we believe it would not
24 apply to the reservations, and the respect in which this point
25 came up in our papers is regarding the challenge of applying

1 the law within precise geographic boundaries based on the
2 approximate IP address information that is available to the
3 company to determine where a user is located. And that would
4 inflict an unfair detriment on the territories of the tribes
5 that are within the State of Montana because, by the terms of
6 the law, it wouldn't be competent to regulate there, but,
7 nevertheless, people who would lawfully be permitted to access
8 TikTok in those areas might nevertheless have an undue burden
9 inflicted on them because of the challenges in determining
10 whether they are actually in a territory that is appropriately
11 regulated by SB 419, the territorial jurisdiction of Montana,
12 as you say, or on the territory of a Native American tribe.

13 THE COURT: Well, if an indigenous person is on the
14 Crow Indian Reservation using TikTok, does TikTok get nailed
15 for \$10,000 when the individual is not subject to the law, if
16 my hypothetical is true?

17 MR. BERENGAUT: Our understanding is that the law
18 would not reach there. I would welcome the State's view on
19 that since they would be the one in position to enforce the
20 law.

21 Our concern, Your Honor, is that even if that person
22 on -- the indigenous person in that territory is lawfully
23 permitted by SB 419 to access TikTok, the challenges of
24 determining whether they are, in fact, on that territory or
25 not might mean that they would unfairly be deprived of their

1 lawful ability to access the app because of the broad-brush
2 terms of the law and its extremely punitive sanctions which
3 would require any company trying to implement the law to err
4 on the side of caution in order to benefit from the
5 affirmative defense in Section 1, subparagraph (3), that "the
6 violating entity could not have reasonably known that the
7 violation occurred within the territorial jurisdiction of
8 Montana."

9 THE COURT: All right. Thank you. And sorry for
10 the off-the-wall question.

11 MR. BERENGAUT: Thank you, Your Honor.

12 THE COURT: Mr. Corrigan.

13 Good morning.

14 MR. CORRIGAN: Good morning, Your Honor.

15 May it please the Court. Christian Corrigan,
16 solicitor general, on behalf of the defendant, Austin Knudsen.

17 The Court should deny plaintiffs' request for a
18 preliminary injunction. The Montana Legislature responded to
19 serious widespread concerns about data privacy in enacting
20 SB 419 which prevents TikTok from operating in Montana until
21 it ceases ties with China or other foreign adversaries.

22 Now TikTok disputes the concerns addressed by the
23 Montana Legislature and has characterized the mountain of
24 publicly available evidence about its data practices and
25 relationship to the CCP as unconfirmed allegations and

1 unfounded speculation. Yet on the other hand, TikTok claims
2 federal law preempts SB 419 because it's negotiating with the
3 federal government over national security concerns.

4 But the Montana Legislature's concerns are shared by
5 33 states and the U.S. Congress which have all banned TikTok
6 on government devices, not to mention the U.S. Department of
7 Justice, the Trump and Biden Administrations, congressional
8 leadership from across the political spectrum, other foreign
9 governments, former employees of the company, and security
10 experts which have all sounded the alarm.

11 THE COURT: Well, is Senate Bill 419 narrowly
12 construed, and is it narrowly tailored to meet the concern
13 apparently that the legislature had?

14 MR. CORRIGAN: I think it is, Your Honor. To the
15 extent the Court views it through a narrow tailoring analysis,
16 it cures the exact source of evil that it sought to remedy
17 under *City of LA v. Taxpayers for Vincent*. There simply is no
18 other way to guarantee Montanans safety from the use of TikTok
19 other than a flat ban until it ceases its ties with China.

20 And I --

21 THE COURT: But everybody on TikTok gives them
22 voluntarily the information that the State is concerned about,
23 don't they? I mean, you can't get on TikTok without giving
24 them certain private information, just like any other
25 platform, Google, whatever it is.

1 MR. CORRIGAN: I think what differentiates TikTok
2 from any other social media platform and why sort of a general
3 social media law wouldn't work here and would not serve the
4 State's interest and would achieve its goal less effectively
5 is because TikTok is the only application that has a
6 connection to a hostile foreign power. It's the only one
7 where there is evidence that there's a god credential or a
8 backdoor accessible from China. There's no evidence, and the
9 company hasn't put forth any evidence, that Facebook, Meta,
10 Snapchat, any of the other competitor companies have that type
11 of capability.

12 THE COURT: But haven't they put forward some
13 significant sworn affidavits under perjury that they do not do
14 the very things you just said the State was concerned about?
15 They don't give the information to the Chinese military. They
16 do not give the information to the Chinese government. TikTok
17 does not operate in China, nor does their parent corporation.
18 So how do you get it both ways?

19 I mean, it goes back to my question of Ms. Kumar. I
20 mean, what factual basis, not opinion, but what factual basis
21 is required before the State can enact legislation that
22 regulates either on a hypothetical or on known facts?

23 MR. CORRIGAN: Sure, Your Honor.

24 So I think that the State doesn't -- the State is
25 allowed and the Montana Legislature responded to widely

1 publicly available evidence. The State doesn't need to form a
2 blue ribbon commission to show that fire is dangerous or water
3 is wet. The widespread reporting and concerns that were
4 raised were enough for the State to rely on in enacting
5 SB 419.

6 Now in regards to Your Honor's question about their
7 experts, you know, one thing I would say is that is the actual
8 purpose of scrutinizing expert testimony, because you have
9 their experts saying, "Well, I've seen TikTok's policies.
10 This is what they've given to me."

11 But we have a record that the company will say one
12 thing publicly and then do something else. For example, the
13 *New York Times* article that we cite on page 5, Footnote 10,
14 discussing internal documents from its internal messaging
15 software Lark, notes that internal communications and reports
16 from Lark, which is a tool used by all ByteDance's
17 subsidiaries, including its 7,000 U.S. employees, appear to
18 contradict the statements made by TikTok's CEO to Congress.
19 So we have statements from the company on one end and then
20 news reports and whistleblowers coming out and saying, "No,
21 this isn't what's happening" on the other end.

22 And that's why I think that if, if the State -- or
23 if the plaintiffs are going to rely on these declarations,
24 they need to be scrutinized. They need to see if what's being
25 sent to their experts and what their experts are commenting on

1 actually lines up with the facts in this case.

2 THE COURT: Well, there was expedited discovery in
3 the case. Did you find anything that you thought would really
4 negate what their experts are saying?

5 MR. CORRIGAN: So, Your Honor, as you know, we, we
6 obtained some very expedited and limited discovery in the
7 hopes that they might be able to clear up some of the factual
8 questions, but unfortunately it was -- we did not. It was a
9 very limited time frame. There wasn't time to meet and confer
10 and then come to this Court ahead of -- just several weeks
11 ahead of when our response was due.

12 There were questions about the ownership structure
13 of TikTok, about their beneficial owners, and unfortunately we
14 didn't receive anything that was helpful. And, notably, they
15 didn't, they didn't, they didn't cite any of their responses
16 to us as proof to defeat application of the law or defeat the
17 purpose of the law.

18 So I think that while discovery certainly will be
19 helpful if we get into -- the Court gets into a narrow
20 tailoring analysis or if the Court looks at some of the more
21 nuanced questions, but the discovery wasn't productive,
22 Your Honor.

23 THE COURT: Okay. So if you wouldn't mind, go back
24 to the original two points that Ms. Kumar made: that this
25 law, and it appears from the statute itself, is based on

1 national security concerns; and then there is a question about
2 dangerous conduct.

3 One, is national security concern the principal
4 reason the law was enacted? And, two, have you abandoned any
5 argument about dangerous conduct?

6 MR. CORRIGAN: Sure, Your Honor.

7 First, I would say that national security is not the
8 principal focus. It's data privacy. Now that might happen to
9 overlap with national security concerns or nat- -- but there's
10 also no case law specifically saying that a state can't have
11 national security concerns.

12 For example, a state might have a statute against
13 terrorism, punishing terror- -- crimes of terrorism, and a
14 federal law or a federal concern about terrorism might have an
15 international/national security element to it, but there are
16 domestic reasons why a state law could prevent acts of
17 terrorism. And, here, the State is concerned about data
18 privacy and its relation to a hostile foreign power.

19 Now as Your Honor's -- as to Your Honor's question
20 about whether this is, I think, whether it's content-based or
21 conduct-based based on the type of content that's on TikTok,
22 there is nothing in the law aimed at TikTok's actual content.
23 There is nothing in there regulating the law -- or regulating
24 TikTok because of the content that is actually on, on the, on
25 the app.

1 There are, of course, widespread concerns about the
2 types of things that are seen on TikTok, and a number of
3 states are investigating TikTok under traditional consumer
4 protection laws. But to the extent there were any references
5 in the hearing or in the bill to the actual content on TikTok,
6 what I think that gets to is the lack of concern for consumer
7 protection; that the legislature is able to look at an app
8 like TikTok and say, "Well, on the front end, they show such a
9 lack of concern for consumer protection and the types of
10 challenges and content that's put on there, why should we
11 trust them on the back end to not share data with a hostile
12 foreign power that owns a stake in the company?"

13 So I, I would like to get back to point out that
14 something that wasn't brought up is that why this, this bill
15 regulates TikTok's conduct and not its actual content. And
16 *Arcara* makes clear that a sanction imposed pursuant to a
17 generally applicable law doesn't trigger First Amendment
18 scrutiny even where the sanction results in a burden on
19 expression. The bookstore in *Arcara* was being used for
20 illicit purposes, and the closing of the bookstore targeted
21 the illicit activity surrounding it, not the selling of the
22 books.

23 So, here, TikTok's app is the physical premises of
24 the bookstore that just happened to be selling books.
25 Likewise, TikTok is being targeted for its data practices and

1 risk to consumers, not its speech.

2 And another great analogy would be the maker of a
3 cell phone can't prevent the State from banning that cell
4 phone model if it causes cancer or explodes on its user or is
5 designed as intentionally vulnerable to criminals just because
6 nearly everything that happens on a cell phone is protected
7 speech.

8 THE COURT: Well, I think that's not a very good
9 analogy, but that's your argument.

10 And your argument just confuses me about that you
11 need to protect consumers from having their data stolen, I
12 think is the words that are used. Everybody on TikTok
13 voluntarily gives their personal data. So if they want to
14 give that information to whatever the platform is, how is it
15 that you can protect them? That's sort of a paternalistic
16 argument; that, you know, "These people don't know what
17 they're doing. They're exposing themselves to the Chinese
18 military so we need to, say, ban TikTok to keep citizens from
19 exercising certain individual liberties or rights that they
20 may have."

21 MR. CORRIGAN: Well, Your Honor, I think that one of
22 the key differences between TikTok and other apps is that --
23 and the consent given to TikTok is that TikTok claims that it
24 is not associated with a hostile foreign power. Virginia's
25 amicus brief cited Arizona and Indiana consumer protection

1 actions based on deception regarding data privacy and its ties
2 to the CCP. Just two days ago, the State of Utah filed a
3 similar action with claims against the company for deception
4 based on its ties to China and the CCP.

5 And so to the extent a consumer is willing to give
6 up their data to, to a company, that's one thing, but when the
7 company is being deceitful about its connection to the CCP --
8 it would be similar about if a sports gambling website was
9 operating out of the Cayman Islands and posed a risk to
10 consumers because they would have their credit card numbers
11 stolen. The State would still have the ability to say, "No,
12 this website or this entity cannot operate in the State of
13 Montana, even if sports gambling is legal elsewhere, because
14 we think that's too much of a risk." Even if the consumer
15 willingly gives its -- gives his or her data up to that
16 entity, the State is allowed to say, "This product is too
17 dangerous for use in Montana."

18 Your Honor, I would like to address the point about
19 the -- under the First Amendment about time, place, and manner
20 of restrictions and about the availability of an alternative
21 forum.

22 Plaintiff cited the *Jews for Jesus* case, but I
23 differentiate that by saying, well, that was targeted
24 specifically at First Amendment speech and banned specifically
25 all speech in one forum. But I think the more proper analogy

1 would be if an entire airport was shut down or if an entire
2 public park was shut down not to stop the speech there but
3 because the City or the State couldn't guarantee anyone's
4 safety and said no activity would occur there.

5 As to the unique nature of TikTok's platform, I
6 point the Court to *Lone Star Video v. City of LA*, which said,
7 "Although mobile billboards are a unique mode of
8 communication, nothing . . . suggests that [plaintiffs']
9 overall 'ability to communicate effectively is threatened.'" They were "free to disseminate their messages through myriad
10 other channels, such as stationary billboards, bus benches,
11 flyers, newspapers, or handbills."

12 And that's also the same as *Frisby v. Schultz* where
13 the Court found ample alternatives remained because protesters
14 weren't, weren't barred from neighborhoods and could still go
15 door to door; they simply couldn't picket in front of
16 residences.

17 I'd also point out that SB 419 doesn't ban an entire
18 medium. *Packingham v. North Carolina*, the Supreme Court
19 described the internet as a medium, not just one app. *Turner*
20 *Broadcasting v. FCC* calls cable news in general a medium. We
21 don't stop the sharing of all online videos. It's just one
22 channel of communication, just banning one particular unsafe
23 product --

24 THE COURT: So let me ask you this question.

1 If it turns out that the Chinese Communist Party had
2 an interest in the *Missoulian*, could the State ban the
3 *Missoulian*?

4 MR. CORRIGAN: No, Your Honor, unless similar
5 circumstances existed, and I think that that's a really --
6 that as Arcara says, plaintiffs can't use First Amendment
7 protection as a cloak to avoid the State's consumer power.
8 For example, the *New York Times* offers a media app. It can't
9 offer illegal sports gambling simply because it's also
10 offering First Amendment protected activity. So the State
11 wouldn't be able to enact this type of ban unless very
12 specific, nearly identical factual circumstances existed, and
13 that's not the case here, Your Honor.

14 And I think what differentiates TikTok from, say, a
15 news publication or any type of other media outlet is the
16 two-way interaction between the app; where someone is
17 physically just downloading the app on their phone, creates
18 this apparatus that has access to the user's data and poses a
19 real security threat, versus, say, even if a foreign adversary
20 were to open a publication here in Missoula and publish
21 propaganda.

22 I'd also -- on that note, I point to the prior
23 restraint case law and point out that SB 419, of course,
24 doesn't eliminate an entire medium and leaves open alternative
25 avenues. The users are free to put out their content in any

1 other forum, and they've admitted they have access to other
2 platforms; they just don't like them as much.

3 THE COURT: Yeah, but isn't there a distinction
4 between having 200,000 followers on TikTok and having 1,500 on
5 some other platform?

6 MR. CORRIGAN: Well, there might be, Your Honor, but
7 I'd point the Court to a case that they cited, the *U.S. WeChat*
8 *Users v. Trump* case from the Northern District of California.
9 The plaintiffs there established that there were no viable
10 substitute platforms for the Chinese-speaking and
11 Chinese-American community, and the Court said it was the only
12 means of communication for many, not less communication, not
13 less sales. Only.

14 And I think if you go back to *Lone Star Video v.*
15 *City of LA*, we're looking at the overall ability to
16 communicate. And the fact that there are many alternative
17 forums for plaintiffs to use, including other social media
18 apps, shows that while they may not be using their preferred
19 method, there are alternative methods available.

20 And the plaintiffs cite in their reply -- they cite
21 the *Conrad* case, saying that the availability of an
22 alternative forum doesn't justify a prior restraint. But,
23 first, as I've -- we've argued in our briefing, this isn't a
24 prior restraint.

25 And *Conrad* is a great example. It demonstrates why

1 their theory is flawed. In *Conrad*, it was a prior restraint
2 because the theater turned down a specific production because
3 of nudity and lewdness in the production. That's why it
4 became a prior restraint. The proper analogy is if the
5 theater in *Conrad* had said, "We can't guarantee anyone's
6 safety in this theater. We have to shut this down so no one
7 is allowed to."

8 And then, finally, I point the Court to *One World*
9 *One Family v. City of Honolulu*. That was the flat ban on
10 selling merchandise in city streets with no discretion, and
11 that differentiated from a permit regime even though selling
12 T-shirts was plainly First Amendment activity. It was a valid
13 time, place, and manner restriction, not a prior restraint.
14 They banned all commerce from taking place in those areas, and
15 that just happened to include speech.

16 If Your Honor has no more First Amendment questions,
17 or would like to come back to it, I would like to try to
18 address the preemption argument with my remaining time.

19 THE COURT: Would you address the issue which I
20 asked about earlier and you sort of answered, but the narrow
21 tailoring? It seems to me there are a number of things the
22 legislature might have or could have done. For instance:

23 Instead of banning TikTok, regulate what data they
24 could obtain;

25 Create some sort of criminal statute that if they

1 obtained illegally or against the will of the user, they could
2 get prosecuted criminally;

3 Create a civil remedy if any user or anybody using
4 the platform had their data, as the State characterized it,
5 stolen, then they could have a remedy against TikTok itself;

6 Or even recently the attorney general in Montana has
7 been on TV with public address matters that apparently have
8 been effective regarding the safety of sexual exploitation of
9 women and kids. Why not have the attorney general get on and
10 make a public service announcement that, "We think that TikTok
11 is affiliated with the Chinese Communist Party or the Chinese
12 military. Please do not use it. If you do use it, understand
13 you may be compromising your personal data or information"?

14 Seems like there's a lot of things that could have
15 been done short of an outright ban.

16 MR. CORRIGAN: So first, Your Honor, under -- if
17 we're under intermed-, intermediate scrutiny, the State only
18 has to show that it's narrowly tailored to promote a
19 substantial government interest. That would be achieved less
20 effectively absent this regulation.

21 To the extent Your Honor is concerned about strict
22 scrutiny and about there being less restrictive means, I'll --

23 THE REPORTER: Mr. Corrigan, slow down.

24 MR. CORRIGAN: I apologize.

25 THE REPORTER: Slow down.

1 MR. CORRIGAN: To the extent Your Honor is concerned
2 about narrow tailoring, promoting a substantial government
3 interest -- or narrowly tailoring. I'll start there under
4 strict scrutiny. I think the main reason is because of
5 TikTok's ability to dodge general consumer protection
6 investigations.

7 As we cite on page 17, Footnote 14, of our brief,
8 45 state attorneys general have demanded that TikTok produce
9 materials subpoenaed for consumer protection investigations.
10 They wrote that, including Montana, TikTok has repeatedly
11 failed to respond adequately and appropriately to reasonable
12 requests for information.

13 Just a few weeks ago, Tennessee filed a motion to
14 compel in District Court regarding spoliation of material
15 relating to the Lark platform. As I mentioned, that's related
16 to the May 2023 *New York Times* article on page 5, Footnote 10,
17 of our brief about the Lark platform where Beijing-based
18 employees -- a TikTok employee was concerned that
19 Beijing-based employees were owners of Lark groups that
20 contained secret data of U.S. users.

21 And so I think that TikTok provides a unique threat
22 for state consumer protection law and for consumers. And so I
23 think under intermediate scrutiny in particular, allowing
24 TikTok to operate and then saying, "Well, they may be subject
25 to consumer protection investigations or lawsuits from

1 consumers," would be much less effective for the State because
2 there would be, there would be a difficulty in finding types
3 of -- and ascertaining and holding them accountable for
4 violations for sharing data with China, et cetera.

5 THE COURT: Well --

6 MR. CORRIGAN: And I think that's why it satisfies.

7 THE COURT: But of any of the 45 states you
8 referenced, did any of them ban TikTok?

9 MR. CORRIGAN: They, they have not yet, Your Honor.
10 You know, Montana has certainly been at the forefront of this,
11 and Montana took the lead here. But there are -- of course,
12 there's legislation, obviously, pending at the federal level
13 on this, and, and, you know, Montana was first and is the
14 first sort of test case on this.

15 I don't how much time I have left, Your Honor, but I
16 would like to address the preemption argument.

17 THE COURT: You've got ten minutes.

18 MR. CORRIGAN: Wonderful. Thank you.

19 The State's regulation of TikTok doesn't improperly
20 infringe on the federal government's foreign affairs power,
21 nor does it conflict with federal policy. Regarding field
22 preemption, it's not enough for plaintiffs to say that because
23 SB 419 involves China, Montana lacks the power to protect its
24 consumers.

25 And plaintiffs' counsel said that Montana is saying

1 that the fed- -- that China is a foreign adversary. Well, the
2 foreign government has said China is a foreign adversary in
3 15 C.F.R. 7.4, so Montana is simply reiterating what the
4 federal government has said.

5 And no case law cited by the plaintiffs forecloses
6 SB 419. And, in fact, the two cases most relied on for field
7 preemption, *Movsesian* and *Von Saher*, easily support upholding
8 SB 419 for field preemption purposes.

9 *Movsesian* says that a plaintiff can only invoke
10 foreign affairs field preemption if they show, first, the
11 State has no serious claim to be addressing a traditional
12 state responsibility; and, two, it must intrude on the federal
13 government's foreign affairs power.

14 For the first prong, SB 419 isn't aimed at creating
15 a worldwide forum for suing China or TikTok or regulating
16 outside the state's borders like in *Von Saher* or *Movsesian*;
17 and, second, it doesn't intrude on the federal government's
18 foreign affairs power. It doesn't establish Montana's own
19 foreign policy; it fits within the federal government's
20 foreign policy. This is one company, and it's not about
21 regulating outside the state's borders. It simply says this
22 company cannot operate as long as it has these foreign ties.

23 It doesn't subject foreign companies to lawsuits in
24 Montana like *Movsesian* or establish a remedy for wartime
25 injuries like *Von Saher* or adjudicate Holocaust-era insurance

1 claims from Europe 50 years ago like in *Garamendi*.

2 *Movsesian, Von Saher, and Zschernig v. Miller* all
3 look at whether the application of the statute would force the
4 State to make value judgments or determinations about events
5 or rulings in foreign jurisdictions of genocide victims or
6 reparation efforts.

7 As far as conflict preemption goes, the plaintiffs
8 haven't met the high threshold necessary to show SB 419
9 conflicts with the President's power under IEEPA or
10 Section 721 of the Defense Production Act. Plaintiffs have
11 not and cannot point to a direct conflict. The best they can
12 do is assert, assert obstacle preemption, which is very
13 similar to field preemption, and this involves determining
14 whether a state law stands as an obstacle to the execution and
15 objections -- objectives of Congress.

16 But the best plaintiffs can do is point to two laws,
17 one of which they claim they're not subject to, and the other
18 gives the President authority to shift economic activity
19 towards national defense priorities. That's hardly the type
20 of regulatory scheme or statute the Supreme Court found to be
21 an obstacle in *Crosby* or the Eleventh Circuit did in *Odebrecht*
22 or the Supreme Court in *Garamendi* where there was presidential
23 agreement on how to handle Holocaust-era insurance claims.

24 First, under IEEPA, TikTok is a product, not an
25 informational material covered by Section 1702(b). But

1 regardless of whether it is or it isn't, plaintiffs are really
2 making a field preemption argument when they say, on pages 16
3 to 17 of their brief, that Congress has already spoken that
4 national security concerns don't trump First Amendment rights.
5 And we know this because they cite *Von Saher*, which is itself
6 a field preemption case.

7 Now as far as the Defense Production Act goes, it's
8 again at best sort of an implied field preemption or an
9 implied obstacle preemption argument and, more likely, another
10 field preemption. The plaintiffs say that CFIUS may consider
11 whether foreign governments may access U.S. citizen data, and
12 that's the same concern as SB 419, but that's just one factor
13 Congress added in 2018 to what CFIUS could take into
14 consideration. And it's also important that the plaintiffs
15 never actually addressed the purpose of the Defense Production
16 Act, which isn't to protect data privacy; it's about defense
17 preparedness, the domestic supply chain, and national
18 emergencies.

19 Now contrast those statutes with *Crosby* and
20 *Odebrecht*. The sanctions at issue there interfere directly
21 with the primary purpose of the federal regime they affected.

22 In *Crosby*, it was plainly obvious because there was
23 a congressional act regarding sanctions on Burma, and
24 Massachusetts passed sanctions on Burma.

25 *Odebrecht* involved, in the Eleventh Circuit,

1 involved a plethora of laws and regulations about Cuba. And,
2 again, here, plaintiffs have cited two laws: one which they
3 claim they're not subject to; and, two, the other is about
4 emergency authority to control domestic industries.

5 But there are a variety of other differences with
6 *Crosby* and *Odebrecht*. *Crosby* and *Odebrecht* both relied on the
7 fact that the United States received diplomatic objections to
8 the laws.

9 In *Crosby*, the United States government participated
10 as amici and said the act frustrated its goals. And that came
11 after a more full record and testimony from State Department
12 officials that the Massachusetts sanctions got in the way of
13 carrying out congressional objectives.

14 But, most importantly, in both cases, the sole
15 object of the regulation was the foreign government. The Cuba
16 amendment in *Odebrecht* had no value for Florida citizens
17 outside the goal of pressuring the regime in Cuba.

18 And the same goes for *Crosby*. The Massachusetts act
19 kept its citizens from doing business with Burma, but there
20 was no tangible benefit to the State other than punishing
21 Burma.

22 But, here, the State has set this as a consumer
23 protection that tangibly benefits Montana consumers by keeping
24 their data from being shared with a hostile foreign power.

25 THE COURT: Isn't that totally inconsistent with the

1 arguments of the attorney general in the various hearings and
2 his public statements, that the sole purpose is to basically,
3 my words, bring China to some sort of recognition? And it
4 says, "Whereas, the People's Republic of China is an adversary
5 of the United States and Montana and has an interest in
6 gathering information . . . and the intellectual property."
7 It seems like everything that the attorney general argued at
8 hearings and in public statements is directed to, "We're gonna
9 teach China a lesson," not, "We're gonna protect people."

10 MR. CORRIGAN: Well, it's pushing back on intrusions
11 into Montanans' data privacy, and I think the Supreme Court
12 has cautioned about cherry-picking statements from individual
13 legislators or even sponsors of the bill.

14 And I'd point out that the attorney general is not a
15 member of the Montana Legislature. The attorney general --

16 THE COURT: I know, but he wrote the bill.

17 MR. CORRIGAN: He was involved with the bill, but at
18 the end of the day --

19 THE COURT: He said he wrote the bill.

20 MR. CORRIGAN: He was involved with writing the
21 bill, but the elected representatives of Montana are the ones
22 who voted on the legislation. The attorney general -- and,
23 and that, that comes to an issue with legislative history,
24 where looking too much into individual statements would give
25 the ability of individual legislators to perhaps poison the

1 bill or perhaps give a purpose to the bill that isn't actually
2 reflected in its operative functions.

3 And I think to the extent there's overlap with
4 pushing back on China or doing things to push back on -- or
5 that overlap with foreign policy, those are, those are
6 secondary. The first concern is data privacy.

7 THE COURT: Okay.

8 Well, I wonder if you could tell me: What is the
9 limiting principle to what you are arguing? So Wyoming has
10 one set of laws about internet platforms. Idaho has a
11 different one. North Dakota has a different one. New York
12 has a different one. Texas has a different one. What is the
13 limiting principle?

14 MR. CORRIGAN: Sure.

15 So I think national operators routinely have to
16 conform their businesses to in-state operations, and the
17 internet doesn't entirely exempt every national e-commerce or
18 every national operator from state regulation simply because
19 it's operating in a state.

20 I think, first of all, it's important to show that
21 there is no federal regulation in this area. There is no --
22 you know, Virginia's amicus brief discusses that states have
23 various data privacy laws for social media platforms and
24 elsewhere, and so there is no conflicting federal -- set of
25 federal regulations here. States routinely enact data privacy

1 laws. And to some extent, the logical conclusion of the
2 plaintiffs' argument is that it would invalidate application
3 of all state consumer protection or data privacy laws to
4 TikTok.

5 And so I think the limiting principle, if Your Honor
6 is getting into the domestic Commerce Clause area, ultimately
7 it comes down to whether there's some type of undue burden or
8 to the extent the extraterritorial effects doctrine is
9 applicable.

10 I think here in this case, it's very clear from
11 their declaration, from the expert that they've designated,
12 that this technology does exist, and every sports gambling app
13 uses it. They simply claim that they don't want to do it or
14 that it's going to be too burdensome.

15 And I think that that's particularly interesting,
16 Your Honor, given that, again, this technology is very
17 widespread. It's similar to the SPGG- -- *SPGGC v. Blumenthal*
18 case from the Second Circuit about the regulation of gift
19 cards over the internet where the Court found that there was a
20 near perfect way to determine whether the application was
21 operating in the state, and that's why there wasn't an undue
22 burden on interstate commerce.

23 And so ultimately I think if, if the -- the main
24 limiting principle would probably be, if the Court, if the
25 Court goes there, whether there's an undue burden or not, but

1 it involves a variety of factors that I don't think are
2 present here.

3 THE COURT: Okay. Well, you're at your 30 minutes.

4 But would you mind asking the off-the-wall -- or
5 answering the off-the-wall question about the jurisdiction?
6 The implication for the application of this particular law is
7 "the territorial jurisdiction of Montana," which means "all
8 places subject to the criminal jurisdiction of Montana." And
9 I think you probably agree: Montana doesn't have criminal
10 jurisdiction on six of the indigenous reservations.

11 MR. CORRIGAN: I agree, Your Honor, and I think, the
12 State's position, we'd agree with the plaintiffs' position
13 that it would not apply on those reservations, because that
14 would be outside the territorial jurisdiction of the State.

15 THE COURT: So how does that impact the enforcement
16 of the ban?

17 MR. CORRIGAN: Well, I think it would be similar to
18 designating whether -- ascertaining whether someone is in
19 Idaho, Utah, Montana. And as the plaintiffs acknowledge,
20 there is an affirmative defense to enforcement of the law if
21 the violator could not reasonably have known that someone
22 would access it from inside the State of Montana.

23 So to the extent the company may institute some type
24 of geotracking measure and if someone is right on the state
25 line and using it, if the company does a reasonable job to

1 make sure that it's not being operated in Montana, they would
2 have an affirmative defense to enforcement.

3 THE COURT: So is it a criminal statute?

4 MR. CORRIGAN: It is not, Your Honor. It is a
5 civil, it is a civil enforcement, consumer protection statute.

6 THE COURT: And what's the affirmative defense? "We
7 didn't do it"?

8 MR. CORRIGAN: The affirmative defense is that --
9 that I just mentioned is that if they could not have
10 reasonably anticipated that the violation would have taken
11 place in the State of Montana, the statute can't be enforced
12 against them. It's, it's almost a mens rea provision.

13 THE COURT: And so that's enforced by the attorney
14 general's office, not by the county attorney?

15 MR. CORRIGAN: It's enforced by the Office of
16 Consumer Protection under the Office of the Attorney General.

17 THE COURT: So if you wouldn't mind, I think I
18 understood what you said, but Montana is the only forum in the
19 entire United States or its territories that has banned
20 TikTok.

21 MR. CORRIGAN: That's correct, Your Honor. For a
22 flat ban, that's correct.

23 THE COURT: Does that seem a little strange to you?
24 Everybody else is marching and -- it's kind of like the mother
25 that was watching the parade, and everybody -- there's one of

1 the bands that goes by, and one guy is out of step and it's
2 her son. And she said, "Look at that. The whole band is out
3 of step except for my son."

4 MR. CORRIGAN: Well, Your Honor, I think that states
5 are the laboratories of democracy, and states take, states
6 take new types of measures all the time. I think California
7 just banned a whole bunch of products, including Skittles,
8 going forward and is the first state to necessarily do that.
9 And so just because one state is the first to do something
10 doesn't mean it's necessarily out of step.

11 I also think that the evidence for TikTok has gotten
12 worse over the last six months. It's certainly been a concern
13 for, for a number of years, but Montana's Legislature
14 responded very quickly to what it saw are growing concerns and
15 took the first step. And that other states haven't followed
16 isn't necessarily an indictment of the Montana Legislature or
17 Montana having the foresight, and it's very possible they
18 could do so in the future. They might be waiting for the
19 outcome of this litigation, Your Honor. It's possible.

20 THE COURT: All right. Thank you.

21 MR. CORRIGAN: Thank you, Your Honor.

22 THE COURT: So, Ms. Kumar, you have about three
23 minutes. And you can lower that.

24 MS. KUMAR: (Lowering podium.)

25 THE COURT: Yeah. Okay.

1 MS. KUMAR: Just a few points, Your Honor.

2 The State fails to explain how the law is narrowly
3 tailored, nor is it. It doesn't address the purported evil,
4 as Mr. Corrigan just suggested. The danger, at least as to
5 the national -- remember, there's two interests. The national
6 security interest, the danger is not the operation of the
7 platform; it's the sharing -- alleged sharing of data. With
8 respect to dangerous content, again, the evil is not the
9 operation of the platform; it is ostensibly the publication of
10 what content that the State deems dangerous, even if the State
11 had an interest in that.

12 And, remember, the interest must be real, must be
13 substantiated by evidence. As Your Honor knows from the *Free*
14 *Speech Coalition* case, the government cannot just assume harm
15 without showing the harm to justify it in the area of speech
16 regulation.

17 So the government instead, instead of discussing
18 tailoring in any detail, pivots to *Arcara*, claiming that
19 *Arcara* means that this isn't a regulation of speech. *Arcara*
20 concerned a statute of general application where the Court
21 held that the First Amendment is not implicated because
22 application of a public health law to premises that happened
23 to be a bookstore -- the First Amendment isn't implicated in a
24 situation like this.

25 Here, we have a law that has targeted a single

1 platform -- it's not a generally applicable law -- and it is
2 targeted at what that platform does with data, which is an
3 integral part of the speech process under the *Sorrell* case
4 from the U.S. Supreme Court. This is more like *Sorrell* than
5 it is like *Arcara*. It is more like the *Project Veritas* case
6 where the Court held that unannounced recording was protected
7 speech. And it's more like *Minneapolis Star* where the Court,
8 the Supreme Court, held that a tax on the press is still a
9 tax, is still a regulation of speech.

10 The *Jews for Jesus* case is directly on point. It is
11 not distinguishable merely because the government expressly
12 said it was banning First Amendment activities. There is no
13 material distinction here. There is no dispute that TikTok
14 engages in First Amendment protected speech or that its users
15 do as well.

16 Just like the State may not ban speech in an
17 airport, it cannot close a forum for speech that the U.S.
18 Supreme Court itself has held is integral to the fabric of our
19 modern society and culture.

20 We ask that the Court enjoin the law on the basis of
21 the First Amendment.

22 THE COURT: Thank you.

23 Mr. Berengaut, you have, I think, just about three
24 minutes. Actually you've got four minutes.

25 MR. BERENGAUT: Thank you, Your Honor.

1 Three very brief points, Your Honor.

2 The first is in response to my friend's comment that
3 the attorney general's first concern was data privacy with
4 respect to the enactment of this law and not a purported
5 concern about China as a national security threat.

6 This is a quote from the attorney general's
7 testimony before the House of Representatives in connection
8 with the ban. It's in the record at Document 13-2 at page 5.
9 "This is a business that is controlled by an existential
10 threat an [sic] enemy of the United States, and that's China's
11 own words. China considers America it's [sic] largest enemy
12 by their own military doctrines and publications. They see a
13 war with the United States as inevitable, and they're using
14 TikTok as an initial salvo in that war."

15 Again, Your Honor, further indication that the
16 central concern in the enactment of this law was the
17 declaration of a foreign policy with respect to China.

18 Point 2. Regarding *Arcara*, in addition to the
19 reasons that Ms. Kumar explained that case is distinguishable,
20 there is one other reason which ties to the company's First
21 Amendment interest in its exercise of editorial discretion.
22 In that case, the Court noted that the severity of the burden
23 on speech was mitigated by the fact that the bookstore could
24 set up shop at another location in the same town. Here,
25 TikTok cannot move down the street and set up shop elsewhere

1 in Montana. It is being banned from the entire state.

2 And, third, Your Honor, very briefly, on the point
3 about discovery, the State has asserted that there was, there
4 was no time to meet and confer and that's the reason they
5 haven't, haven't responded to the discovery or addressed the
6 discovery or cited the discovery in their papers.

7 The discovery in this case was served on July 21.
8 The State had ample time to raise any purported deficiencies.
9 It did not. It did not seek any meet and confer. It did not
10 seek an opportunity to take depositions of any of the
11 affidavits that were submitted in connection with TikTok's
12 motion for a preliminary injunction.

13 Not only did it not seek further discovery, address
14 the discovery it received, it did not even address the
15 declarations that were submitted together with TikTok's motion
16 for preliminary injunction in its opposition but, instead,
17 rested primarily on the purely legal arguments that you have,
18 you have heard, you have heard today.

19 Thank you, Your Honor.

20 THE COURT: All right. Thank you.

21 Well, the case just argued will be submitted.

22 I would compliment counsel, both, on the briefing in
23 the case.

24 And Mr. Corrigan in particular, I think the State's
25 brief is much better than I have seen in the past. Apparently

1 somebody got rid of the poison pen over there, and your
2 briefing is very helpful.

3 And the briefing of the other -- the plaintiffs is
4 certainly helpful.

5 And I will get a resolution of this on a preliminary
6 matter, not on any permanent matter, but on a preliminary
7 matter as quickly as I can.

8 So thank you for the argument, and we will be in
9 recess.

10 (Proceedings were concluded at 10:11:19.)

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1 REPORTER'S CERTIFICATE

2 I, JoAnn Jett Corson, a Registered Diplomate
3 Reporter and Certified Realtime Reporter, certify that the
4 foregoing transcript is a true and correct record of the
5 proceedings given at the time and place hereinbefore
6 mentioned; that the proceedings were reported by me in machine
7 shorthand and thereafter reduced to typewriting using
8 computer-assisted transcription; that after being reduced to
9 typewriting, a certified copy of this transcript will be filed
10 electronically with the Court.

11 I further certify that I am not attorney for, nor
12 employed by, nor related to any of the parties or attorneys to
13 this action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at Missoula,
15 Montana this 27th day of October, 2023.

16

17 /s/ JoAnn Jett Corson

18 _____
19 JoAnn Jett Corson
20 United States Court Reporter
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